Searching for the Ariadne‘s thread – The Legal Complexities of “Grexit” and “Graccident”

verfassungsblog.de/auf-der-suche-nach-dem-ariadnefaden-von-den-rechtlichen-schwierigkeiten-von-grexit-und-graccident-2/

Christoph Herrmann So 15 Mrz 2015

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It seems more and more likely that Greece will not be able or willing to fulfill the reform demands by the Eurogroup, condition for the payment of available funds under the prolonged financial assistance programme, not to mention an additional programme. The immediate consequence seems obvious: Greece would not be able to meets its obligations due, in particular vis-à-vis the IMF and the ECB, would default and decide to leave the Euro (“Grexit”). In an alternative scenario, the apparent governmental chaos in Greece would lead to a situation in which Greece would accidentally exit the Euro, since its Government has lost the view over its public accounts (“Graccident”). Even the German federal finance minister Wolfgang Schäuble recently mentioned that possibility in public. In accordance with the position of the German Constitutional Court, Bundesbank president Jens Weidmann pointed out that the decision about who is part of the Euro area is a political one. Whether or not leaving the Euro and introducing a new currency of its own (“New Drachma”) were a wise economic policy decision or not is not the point for us as lawyers to discuss. Economists seem to be divided on the matter. However, even the economic policy discussion should distinguish between two questions (which sometimes seem to be confused): Whether Greece would be economically better off with a separate currency cannot be equated with whether it is also better to leave the Euro. Both questions would only receive the same answer if leaving the Euro area would not create relevant economic welfare losses or at least losses lower than the economic welfare gains to be expected as a consequence of the new currency. This brings lawyers back into the game. Contrary to a widely held belief – even by lawyers who should know better – leaving the Euro is by no means an easy legal exercise, even if one may claim that it should be possible for highly-skilled legal talents to find a way. So let’s go searching!

It’s a generally recognized element of the sovereignty of States that they may adopt their own currency and declare it legal tender (*ius cudendae monetae*). Some States choose not to do so but to use foreign currencies instead – the case of dollarization or euroization, unilaterally or on the basis of public international law agreements. The determination of a legal tender by sovereign States, the *lex monetae*, is to be recognized by other States – in particular in cases of a monetary reform. To what extent a monetary changeover can have legal effects is a question of private international law and depends on the precise criteria and connecting factors chosen. According to these principles, Greece could of course issue a new currency, determine an initial exchange-rate to the Euro and grant the new currency legal tender status. Alternatively, Greece could try to pay its domestic creditors (civil servants and the like) with non/low-interest-bearing bearer notes (IOU – “I owe you”). Absent the introduction of a new currency, these notes would have to be denominated in euro. Such “State paper money” existed in many countries of the world, e.g. in Germany prior to World War I (“Reichskassenscheine”). California did something similar in 2009. Such State paper normally does not have legal tender status but is accepted by public authorities (e.g. for tax payments).

However, the monetary law situation of Greece is not just slightly different from an ordinary sovereign State. It is indeed surprising, to what extent the resulting problems are being ignored – in particular by economists ready to blame the financial assistance programs and the ECB’s bond buying as “clear violations of the law” and proposing a Grexit as an alternative solution to the problem. Let us try to enlighten the monetary law darkness a bit – this does certainly not mean to carry coals to Newcastle (the German saying speaks of “carrying owls to Athens”, referring to the old Greek silver drachma which – as todays Greek euro – displayed an owl on one side).

According to Article 3 (4) TEU, the EU shall establish an economic and monetary union whose currency is the euro. The Member States have transferred sovereign rights to that end to the EU level, namely the *ius cudendae monetae*. The primary and secondary legal framework for the achievement of the stated objective is somewhat complicated and confusing. The central secondary law provisions are to be found in Regulation (EC) 974/98 on the introduction of the euro. This applies to Greece, following the abrogation of its original derogation (cf. Art. 139 TFEU) on the basis of the predecessor of now Art. 140 (2) TFEU (Decision 2000/427/EC; Regulation (EC) 1478/2000) since 1 January 2001 (Regulation No. 2596/2000). On the basis of Regulation 974/98, the Euro has replaced the drachma on the basis of the determined exchange-rate and – ever since – is “the currency” of Greece. Only banknotes issued by the ECB and the National Bank of Greece as well as euro coins issued by the Greek government enjoy legal tender status in Greece. Notes and coins denominated in drachma could only serve as legal tender for six month after the cash changeover on 1 January 2002. This is the applicable *lex monetae* for Greece for the time being.

Readers knowledgeable in European law will not be surprised: these regulations are directly applicable in Greece and take primacy over all national legislation. Hence, Greece does not enjoy monetary sovereignty in the aforementioned sense anymore. The unilateral introduction of a new currency by Greece would clearly violate Regulation 974/98. Creditors should be able – also before Greek courts – to claim payment in Euro on the basis of this EU law argument. It would be naïve to expect they would not try!

Without an amendment of the EU secondary legal framework, a new currency cannot be introduced legally in Greece. Mostly, a voluntary or forced exit from the euro area is being discussed on a primary EU law basis, e.g. a withdrawal by using Article 50 TEU by analogy (a maiore ad minus). Legally, the argument is not convincing. With a view to the procedure, it is also not feasible in practice, given that an exit would have to be a sudden surprise. The one-million-drachma-question hence is: is it possible to amend Regulation 974/98 (and the other secondary legal instruments cited above) so that they would not apply to Greece anymore (in concreto: strike out Greece in the annex to Regulation 974/98)? This would undoubtedly require a legal basis in the Treaties. For Regulation 974/98, this would be Art. 140 (3) TFEU. On this basis, the Council – acting unanimously (only euro area members) on proposal by the Commission and after consulting the ECB, determine the exchange-rate for a currency to be substituted by the euro and may take the other necessary measures for the introduction of the euro as the single currency in the Member State concerned. Article 140 (3) TFEU – quite obviously – is a one-way road (“irrevocably”; “for the introduction of the euro”), but nevertheless the most likely legal basis for a “grexit-regulation”, in particular as the European Parliament has no say in the procedure which makes it possible to adopt a regulation over a weekend – for practical reasons for the prevention of a bank run and a massive capital flight from Greece (which is already taking place anyway) a necessary precondition for a suitable legal basis. Whether or not the Court of Justice of the European Union would concur with such an interpretation of Article 140 (3) TFEU is a question impossible to answer. Proponents of a grexit will point to the Pringle judgment and claim that the Court was willing to deal “constructively” with the euro crisis. However, this argument is not entirely convincing, as the Pringle judgment – taking into account the wording of Article 125 TFEU – has a solid methodological basis in the Treaties. This would not be the case in regard to Article 140 (3) TFEU, in particular since a grexit would constitute a disintegration act the legalization of which would manifestly change the legal foundations of the euro area.

EU law does clearly not provide for the re-introduction of national currencies after adoption of the euro. It does also not offer a legally certain way to leave the euro. The Member States did not take and Ariadne thread with them when they entered the Minotaur’s labyrinth. Should grexit or graccident still occur – the regulatory power of monetary law is sometimes limited – this would produce an aftermath of legal proceedings and generate legal uncertainty for years to come, at least in Greece. Not a calming finding for the economic and social development of Greece.

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